



Federal Communications Commission
Washington, D.C. 20554

August 5, 2011

DA 11-1359

In Reply Refer to:

1800B3-MFW

Released: August 5, 2011

Mr. Charles Harder
571 NW McClurg Court
White Springs, FL 32096

In re: DWJFA(AM), Hilliard, FL
The Dianne Mayfield-Harder Trust
Facility ID No. 160193
File No. BAP-20090130AAC

Petition for Reconsideration

Construction Permit No. BNP-20050118ABJ

Dear Mr. Harder:

We have before us a January 15, 2010, Petition for Reconsideration (the "Petition") filed by Mr. Charles Harder ("Harder") seeking reconsideration of a December 16, 2009, staff action dismissing as moot the referenced application for Commission consent to the assignment of the construction permit for unbuilt station WJFA(AM), Hilliard, Florida, from the Dianne Mayfield-Harder Trust ("Trust") to Mr. Harder (the "Application"). For the reasons set forth below, we deny the Petition and declare expired the underlying construction permit.

Background. On January 30, 2006, the staff granted the Trust's application for a new AM station in Hilliard, Florida.¹ The construction permit specified an expiration date of 3:00 a.m. on January 30, 2009. On that permit expiration date, the parties filed the Application. On December 16, 2009, the staff, by *Public Notice*, dismissed the Application as moot because the permit had expired.² Harder timely filed the Petition on January 15, 2010.

In the Petition, Harder indicates that, between the original filing in the Auction 84 filing window and the grant of the permit two years later, Ms. Mayfield-Harder's health and financial condition had deteriorated, and with the "evolving economic slowdown" in the country resulting in a "drastic decline in broadcast lending opportunities," the Trust was unable either to construct the Hilliard facility or find a

¹ File No. BNP-20050118ABJ. The application indicates that Ms. Dianne A. Mayfield-Harder, as trustee, was the sole principal of the trust with 100 percent voting rights and equity. *Id.* at Section II, Item 2. The initial Hilliard proposal was filed during the January 2004 filing window for AM Auction No. 84 and was determined to be a "singleton," and the Trust was invited in November of 2004 to file a complete "long-form" application. *See AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 22569 (MB 2004) and Attachment A-2 p. 3.

² Public Notice of the dismissal of the Application was released on December 21, 2009. *See Broadcast Actions*, Public Notice, Report No. 47136 (Dec. 21, 2009).

buyer for the construction permit. Mr. Harder indicates that he has a great deal of broadcast experience as a talk show host and, although he began exploring opportunities working with a broker and bank to acquire the permit, his own serious health reversals prevented him from pursuing the project until late January of 2009. He indicates that he understood that, “under a new FCC diversification policy,” a permit about to expire could be assigned to a qualified “small business entity” such as himself, and entered into an asset purchase agreement with the Trust on January 29, 2009; he indicates that staff at the Commission’s Media Bureau led him to believe that he had through the entirety of January 30, 2009, to file an application to acquire the Station. He states that, with assistance of counsel, he was able to file the Application on January 30, 2009.³ Mr. Harder states that, without further information from the Commission, he assumes that the dismissal of the Application as moot was based on the three-hour variance between the time the permit expired and the time the application was filed, and he asks that the dismissal of the Application be reconsidered.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission’s original order, or raises additional facts, not known or existing at the time of petitioner’s last opportunity to present such matters.⁴

Broadcast construction permits forfeit automatically by operation of law upon expiration.⁵ The mere filing of an assignment application is not a basis for additional construction time.⁶ In 2008, the Commission provided certain broadcast assignees with an opportunity to receive additional time to complete construction of new broadcast stations with expiring construction permits.⁷ However, on July 7, 2011, the United States Court of Appeals for the Third Circuit issued a decision⁸ vacating the Commission’s “eligible entity” definition, and remanding those provisions of the *Diversity Order*⁹ that

³ Mr. Harder indicates that, although he believed that he had until 3:00 a.m. on January 30, 2009, to file the application, he acknowledges that he was unable to file the Application electronically until 5:56 a.m. on January 30, 2009.

⁴ 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

⁵ See 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications*, Report and Order, 13 FCC Rcd 23056, 23091 (1998); 47 C.F.R. § 73.3598(e).

⁶ See 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17533 (1999).

⁷ See *In the Matter of Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”). Section 73.3598(a), as revised in the *Diversification Order*, provides that an eligible entity acquiring an “issued and outstanding” construction permit for a new unbuilt broadcast station shall have the time remaining on the construction permit or 18 months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file a license application. See 47 C.F.R. § 73.3598(a).

⁸ *Prometheus Radio Project v. FCC*, No. 08-3078 (3d Cir. July 7, 2011) (“*Court Decision*”).

⁹ *In the Matter of Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“*Diversity Order*”). To delineate the group receiving the benefits of the measures adopted in the *Diversity Order*, the Commission used the term “eligible entity” as defined in the Commission’s 2002 Biennial Review Order. See 2002 Biennial Regulatory Review – (footnote continued)

rely on the “eligible entity” definition. Pending such review, the Media Bureau (“Bureau”) has suspended application of the eligible entity rule provisions and policies in all contexts.¹⁰ In announcing this course of action, the Bureau stated that, for pending applications, if the construction permit has expired, the construction permit is forfeited and the Bureau will dismiss the assignment application.¹¹

In light of the *Eligible Entity Public Notice*, it is immaterial when on January 30, 2009, the Trust and Mr. Harder filed the Application. The WJFA(AM) construction permit expired on that date and is forfeited, and we cannot reinstate the Application.

Conclusion/Actions. For the reasons stated above, IT IS ORDERED, that the January 15, 2010 Petition for Reconsideration filed by Mr. Charles Harder is DENIED.

IT IS FURTHER ORDERED, that the construction permit (File No. BNP-20050118ABJ) for a new AM station at Hilliard, Florida IS DECLARED EXPIRED as of 3:00 a.m. on January 30, 2009.

IT IS FURTHER ORDERED, that the call sign WJFA(AM) IS DELETED.

Finally, to the extent relevant here, it is imperative to the safety of air navigation that any prescribed painting and illumination of the station’s tower be maintained until the tower is dismantled. Accordingly, the owner of the tower where the referenced station’s transmitting antenna is located must maintain the tower in the manner prescribed by the Commission’s rules and the terms of the expired license.¹²

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Thomas McCoy, Esq.

Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13810-12 (2003). Generally, “eligible entities” are defined to include all entities that qualify as small businesses under the standards of the Small Business Administration for industry groupings based on revenue.

¹⁰ See *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, DA 11-1232, 26 FCC Rcd ____ (MB Jul. 25, 2011) (“*Eligible Entity Public Notice*”).

¹¹ *Id.* at 2.

¹² See 47 U.S.C. §303(q); 47 C. F. R. § 17.6.